U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SAMUEL JACKSON and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Detroit, MI

Docket No. 99-1091; Submitted on the Record;
Issued April 30, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation based on its determination that the selected position of electronics technician represented appellant's wage-earning capacity.

The Board has duly reviewed the case record and finds that the Office properly reduced appellant's compensation based on its determination that the selected position of electronics technician represented appellant's wage-earning capacity.

On August 27, 1986 appellant, then a 38-year-old engineering technician, filed a traumatic injury claim (Form CA-1) alleging that on August 26, 1986 he injured his lower back while lifting a case of 300-watt lamps. He stopped work on August 27 and returned to work on September 8, 1986.

By letter dated October 6, 1986, the Office accepted appellant's claim for back strain.

By letter dated December 5, 1988, the Office expanded the acceptance of appellant's claim to include aggravation of preexisting spondylolisthesis. The Office noted that it had authorized back surgeries, which were performed in 1987 and July 1988.

On December 13, 1988 appellant filed a claim (Form CA-2a) alleging that he sustained a recurrence of disability. He stopped work on October 16, 1987 and has not returned to work.[1]

The Office determined that work restrictions from Dr. Paul Shapiro, a Board-certified physiatrist and appellant's treating physician and vocational testing were necessary.

[1] The Board notes that since the Office has not issued a final decision on appellant's recurrence claim, the Board may not address this issue for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

On September 22, 1994 the Office referred appellant to a vocational rehabilitation counselor.

The rehabilitation counselor submitted an October 14, 1994 report indicating his findings on vocational testing. Dr. Shapiro submitted a work-capacity evaluation Form OWCP-5c dated October 24, 1994 revealing appellant's physical restrictions and recommendation that appellant undergo a functional-capacity evaluation. A November 17, 1994 report provided the results of appellant's functional-capacity evaluation, including appellant's physical restrictions and finding that he could not return to his date-of-injury position. On May 1, 1995 the Office authorized appellant's participation in a training program at Henry Ford Community College for the period May 1995 through May 1996 to update his electronic skills.

In a memorandum to the file, the Office indicated that on March 26, 1996 appellant fell at home aggravating his back condition. The Office also indicated that due to this accident, appellant withdrew from the training program.

In a May 23, 1996 letter, the Office advised Dr. Shapiro to provide *inter alia*, whether appellant had returned to normal functioning since his March 26, 1996 fall and whether the fall changed appellant's capabilities. The Office also advised Dr. Shapiro to submit a work-capacity evaluation. In a May 28, 1996 response letter, Dr. Shapiro stated that appellant had returned to his usual level of functioning and he had essentially resolved the acute injuries related to his March 1996 fall. He further stated that appellant's fall had not substantially changed appellant's physical capacities. In an accompanying OWCP-5c form dated June 7, 1996, Dr. Shapiro indicated appellant's physical restrictions and that he could work eight hours per day.

Appellant returned to the training program at the community college and the Office authorized appellant's participation in this program for the period September 1996 through April 1997. Through a cooperation program, appellant began full-time work as an electronics bench technician on September 5, 1996. His employment was terminated on December 6, 1996.

Subsequently, new employer services were begun by a rehabilitation counselor while appellant completed his training. In a May 2, 1997 report, the rehabilitation counselor identified the position of electronics technician listed in the Department of Labor's *Dictionary of Occupational Titles* as being within appellant's physical and vocational capabilities. The counselor also determined that the selected position was reasonably available in appellant's commuting area.

In a May 22, 1998 notice of proposed reduction of compensation, the Office advised appellant that it proposed to reduce his compensation because the factual and medical evidence of record established that he was no longer totally disabled. The Office further advised appellant that he was only partially disabled and that he had the capacity to earn the wages of an electronics technician. The Office also advised appellant to submit additional evidence or argument within 30 days if he disagreed with the proposed action. In response, the Office received medical evidence.

By decision dated July 28, 1998, the Office reduced appellant's compensation effective July 18, 1998 based on his capacity to earn wages as an electronics technician. In a July 30,

1998 letter, appellant requested reconsideration of the Office's decision accompanied by medical evidence.

In a November 4, 1998 decision, the Office denied appellant's request for modification based on a merit review of the claim.[2]

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] Pursuant to section 8115(a) of the Federal Employees' Compensation Act,[4] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.[5]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.[6] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[7]

In the instant case, the Office determined that appellant was no longer totally disabled based on Dr. Shapiro's June 7, 1996 Form OWCP-5c. He indicated appellant's physical restrictions, which included limited bending, lifting, twisting, stooping, squatting, crawling, climbing and prolonged standing or walking. Dr. Shapiro further indicated that appellant should perform sedentary or light work and that appellant could work eight hours per day.

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[2] The Board notes that subsequent to the Office's November 4, 1998 decision, the Office received additional medical evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy,* 47 ECAB 259 (1995); *James C. Campbell,* 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 501.2(c).

[3] *Patricia A. Keller,* 45 ECAB 278 (1993).

[4] 5 U.S.C. § 8115(a).

[5] *See Dorothy Lams,* 47 ECAB 584 (1996).

[6] *See Dennis D. Owen,* 44 ECAB 475 (1993).

[7] 5 ECAB 376 (1953).

The physical requirements of the selected position of electronics technician required lifting up to 20 pounds and frequent reaching, handling, fingering, feeling, talking, hearing, near acuity depth perception, vision accommodation and color vision. Appellant worked previously as an electronics bench technician during the period September 5 through December 6, 1996. The position, electronics technician, therefore, is within appellant's physical limitations and vocational capabilities.

Moreover, the Office calculated that appellant's wage-earning capacity using the *Shadrick* formula. The Office indicated that appellant's salary on August 26, 1986, the date of injury, was $491.46 per week, that his current, adjusted pay rate for his job on the date of injury was $724.12 per week and that appellant was currently capable of earning $340.00 per week, the rate he earned when he worked as an electronics bench technician from September 5 until December 6, 1996. The Office determined that appellant had a 47 percent wage-earning capacity, which when multiplied by 3/4 amounted to a compensation rate of $195.24. The Office found that based on the current consumer price index, appellant's current adjusted compensation rate was $270.25. The Office, therefore, met its burden of proof in reducing appellant's compensation based on his wage-earning capacity as an electronics technician.

Further, appellant has not submitted sufficient subsequent medical evidence to modify the Office's wage-earning capacity determination. It is well established that either a claimant or the Office may seek to modify a formal loss of wage-earning capacity determination.[8] In this case, appellant submitted medical reports from Dr. Shapiro addressing his total disability. Dr. Shapiro's June 23, 1997 report revealed his discussion with appellant regarding back surgery and measures to stabilize his condition in order to avoid surgery at that time. He opined that appellant was not capable of working at that time. In a September 9, 1997 report, Dr. Shapiro indicated his findings on physical examination regarding appellant's back and legs. He opined that appellant was totally disabled at that time. Dr. Shapiro's July 30, 1998 report revealed appellant's complaints and his opinion that appellant was totally disabled from work since his first report in June 1997. He stated that appellant's difficulty with holding one position for very long and his need to lie down during the day would be very difficult for him to maintain a job in his field. Dr. Shapiro's October 26, 1998 report revealed his findings on physical examination. He stated that there was no evidence of radiculopathy or any strong indication of why there was a burning pain that appeared to be new. Dr. Shapiro opined that appellant was disabled at that time and this would last indefinitely. His reports failed to provide any medical rationale explaining how or why appellant's back condition prevented him from performing the duties of an electronics technician. Further, Dr. Shapiro's opinion regarding causal relationship in his June 23, 1997 and July 30, 1998 reports are not based on physical and objective findings. There is no other medical evidence of record establishing that appellant was unable to perform the duties of an electronic technician due to his August 26, 1986 employment-related back condition.

Accordingly, the Board finds that the Office properly determined that appellant was no longer totally disabled as a result of his August 26, 1986 employment-related back condition and followed established procedures for determining that the position of electronic technician

[8] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination. *Gregory A. Compton*, 45 ECAB 154 (1993); *Stephen C. Belcher*, 42 ECAB 696 (1991).

represented appellant's wage-earning capacity. The Board, therefore, finds that the Office has met its burden of proof in reducing appellant's compensation for total disability.

The November 4 and July 28, 1998 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
April 30, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member